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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BEACHWOOD CANYON NEIGHBORHOOD ASSOCIATION, et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES, Defendant and Respondent.	B288964 (Los Angeles County Super. Ct. No. BS151004)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Reversed.

The Law Offices of David Lawrence Bell and David Lawrence Bell for Plaintiffs and Appellants Beachwood Canyon Neighborhood Association; George Abrahams and Doug Haines.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, Matthew A. Scherb, Deputy City Attorney for Defendant and Respondent.

INTRODUCTION

Petitioners[1] Beachwood Canyon Neighborhood Association, George Abrahams, and Doug Haines filed a petition for writ of mandate and complaint for declaratory relief against the City of Los Angeles (the City), alleging that petitioners were denied access to a public meeting of the Hollywood Design Review Committee (HDRC), a city council advisory board. They alleged they were unconstitutionally denied access to a limited public forum based on their viewpoints and in retaliation for suing the City in relation to certain development projects. The City asserts that the meeting was not a "forum" at all, because it was a closed meeting of advisors to a city council member. The City asserts that no constitutional rights were affected by barring petitioners from the closed meeting. After a circuitous procedural history that included substantive rulings by several judges, the superior court granted the City's motion for a judgment of nonsuit on petitioners' constitutional claims.

We reverse. The petitioners' allegations and offer of proof were sufficient to show that HDRC meetings were traditionally open to the public, and that a city council member said petitioners were excluded from the meetings because they "disagreed" with him and had filed lawsuits in the past. This evidence was sufficient to overcome nonsuit on petitioners' request for declaratory relief on constitutional grounds.

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[1] Petitioners filed a combination petition for writ of mandate and complaint in the superior court. We follow the parties' lead and refer to them as "petitioners."

FACTUAL AND PROCEDURAL BACKGROUND

A. Original petition and demurrer

1. *Petition*

The following facts were alleged in the petition for writ of mandate and complaint for declaratory relief. The HDRC "exists to review major land use projects proposed for the Hollywood area, and for over 20 years it has served as an official advisory board for City Council District 13 ('CD13')." "The HDRC's membership consists of architects and other professionals who are individually approved by CD13's elected representative." Petitioners alleged that the HDRC was created by formal action by the Los Angeles City Council on March 22, 2001.

The Beachwood Canyon Neighborhood Association is a nonprofit public benefit corporation. "Its members include residents and residential property owners in the City of Los Angeles who advocate for residential quality of life issues and oppose worsening environmental impacts," including issues such as increased traffic, preservation of historic and cultural resources, increased burdens on public services, and "unrestrained growth." Petitioners George Abrahams and Doug Haines were directors of the Beachwood Canyon Neighborhood Association, and both were active in other neighborhood planning organizations.

Petitioners alleged that on June 26, 2014, an HDRC meeting was held at the office of Lehrer Architects "to discuss various projects proposed for Hollywood." Abrahams and other members of the public went to the meeting location, but "were denied entry to the building." Haines was also denied access, but he entered the room anyway. When Haines picked up a copy of the meeting agenda from a table, Marie Rumsey, planning

deputy for CD13, "pulled the agenda from his hand and physically shoved him toward the exit." Meanwhile, "Abrahams observed groups of lobbyists entering the building at will."

On September 8, 2014, petitioners filed a "petition for writ of mandate and complaint for declaratory and injunctive relief" against the City of Los Angeles and the Los Angeles City Council. Petitioners alleged two causes of action. In the first cause of action, petitioners alleged that respondents "have violated and have indicated their intention to continue to violate their duties under the Brown Act." (Gov. Code, § 54950 et seq.). The Brown Act "provides that all meetings of 'the legislative body of a local agency shall be open and public,' except as otherwise provided in the Act." (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 823.)

In the second cause of action for declaratory relief, petitioners asserted that a present controversy existed regarding the ongoing Brown Act violations and the "refusal to allow members of the general public to attend meetings of the HDRC." Petitioners alleged that barring the general public from HDRC meetings but allowing lobbyists to attend was prejudicial to petitioners and the public, "and deprives them of a meaningful opportunity to participate in government decisions that directly impact their community." Petitioners asked that the court order respondents to "reschedule and rehear the June 26, 2014 [HDRC] meeting," and allow full public participation in all future meetings.

2. *Demurrer*

The City demurred to the petition. Because the Brown Act claims are not relevant to the issues on appeal, we provide only a brief overview of the arguments here. In short, the City asserted

that the HDRC was "organized by a single City Council office and not by a formal action of the City Council, and thus the HDRC is not a legislative body" governed by the Brown Act. The City contended that because "the HDRC is not a legislative body" it was "not required to be open to the public." The City asked that the demurrer be sustained without leave to amend.

Petitioners opposed the demurrer, arguing that documents attached to the petition showed that the City Council created the HDRC more than 20 years earlier, and that it was a public body subject to the Brown Act. Petitioners also asked that they be permitted to amend their petition if the court was inclined to sustain the demurrer. They asserted that even if the City's Brown Act argument was successful, "other causes of action based upon the same facts as plead [*sic*] may be sustainable," including "claims regarding violations of due process, equal protection, the right to petition the government, as well as claims related to government estoppel and other equitable theories."

The trial court, Judge Robert O'Brien presiding, sustained the demurrer with leave to amend. There is no transcript of the hearing in the record on appeal. The minute order stated, "The demurrer is sustained with leave to amend on the grounds set forth in the moving papers."

B. Amended petition and motion to strike

1. *Amended petition*

On February 17, 2015, petitioners filed a first amended petition/complaint with six causes of action: (1) violation of the Brown Act, (2) violation of procedural due process under the United States and California constitutions, (3) violation of the rights to free speech and to petition the government for redress of grievances under the United States and California constitutions,

(4) violation of equal protection under the United States and California constitutions, (5) government estoppel, and (6) declaratory relief.[2] Again petitioners asserted facts supporting their allegation that the HDRC was created by the City Council in 2001, and that it was subject to the Brown Act. Petitioners also alleged facts regarding the June 26, 2014 HDRC meeting, including that petitioners and other members of the public were excluded.

The amended petition included a section regarding statements made by City Council member Mitch O'Farrell on September 17, 2014—nine days after the original petition was filed. Petitioners alleged that O'Farrell told a member of the Beachwood Canyon Neighborhood Association that he did not want to open HDRC meetings to people only interested in opposing or litigating about development in Hollywood. Petitioners also alleged that on January 15, 2015, O'Farrell said that people who tried to "crash" HDRC meetings in the past would not be allowed to attend future meetings. Petitioners alleged that O'Farrell was "singling them out because of positions they have previously taken on matters of public concern, and because they have previously been involved in litigation against the City of Los Angeles."

The first cause of action for a Brown Act violation alleged facts similar to those in the original petition regarding petitioners' exclusion from the June 26, 2014 HDRC meeting. Petitioners also alleged that the City Council, "in a formal action,

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[2] Petitioners added as a respondent "CRA/LA a Designated Local Agency and Successor for the former Community Redevelopment Agency of the City of Los Angeles." The City is the only respondent to appear in this case.

officially created the HDRC" in 2001, and "Councilmember Mitch O'Farrell, who became a member of the [City Council] in 2013, . . . did not create the HDRC."

In the second cause of action for violation of due process, petitioners alleged that respondents violated the United States and California constitutions. They asserted that respondents infringed their property rights by making decisions relating to major developments without community input and without due process.

In the third cause of action for violation of free speech and right to petition government for redress of grievances, petitioners asserted that respondents violated the First Amendment of the United States Constitution. Petitioners contended that as homeowners, business owners, and other "stakeholders in the community," they had a right to attend public meetings and communicate their concerns to government decision makers.

In the fourth cause of action for violation of equal protection,[3] petitioners alleged that the Fourteenth Amendment to the United States Constitution "prohibits government discrimination based upon viewpoint and the exercise of fundamental rights." Petitioners alleged that O'Farrell's "decisions concerning who is allowed to attend meetings of the HDRC are official government policy of the City of Los Angeles." O'Farrell stated that petitioners were not allowed to attend HDRC meetings "because of the positions they have taken on

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[3] The fourth cause of action in the amended complaint is titled "Violation of the Right to Free Speech and to Petition the Government for Redress of Grievances." However, the cover page of the amended petition states that the fourth cause of action is for equal protection violations, and the body of the cause of action alleges equal protection violations.

matters of public concern in their communities and because they have been involved in litigation over such issues in the past."

In the fifth cause of action for government estoppel, petitioners alleged that HDRC meetings had been open to the public "[f]or more than 25 years," and when the City "officially established the HDRC as a committee" of the City Council in 2001, the meetings of the HDRC became subject to the Brown Act. To the extent that the Brown Act does not apply, petitioners relied to their detriment on respondents' representations that the Brown Act *does* apply. Petitioners alleged that therefore, the City should be estopped from arguing that the Brown Act does not apply to HDRC meetings.

Petitioners amended the sixth cause of action for declaratory relief to include several constitutional allegations. For example, petitioners alleged that respondents did not allow petitioners and the public to attend HDRC meetings "as required by the Brown Act and the United States and California Constitutions." Respondents did this "to minimize opposition to projects favorable to City Council members and to discriminate and retaliate against Petitioners for their exercise of their fundamental rights to free speech, assembly, association, and to petition the government for redress of grievances." Petitioners also alleged that respondents "acted to chill Petitioners in the exercise of their fundamental rights, and to deprive Petitioners of liberty and/or property without due process of law." They asserted that respondents would continue to act in violation of the law without judicial intervention. Petitioners requested that the court order respondents to re-hear the June 26, 2014 meeting and allow the public to attend, and to comply with the Brown Act and the United States and California constitutions.

2. *Motion to strike and ruling*

The City filed a motion to strike portions of the amended petition. (Code Civ. Proc., §§ 435, 436.) The City argued that the court's order on the demurrer allowed petitioners to amend their two causes of action for Brown Act violations, and did not authorize petitioners to add multiple causes of action unrelated to their Brown Act claims. The City asked the court to strike "the new Second, Third, Fourth and Fifth Causes of Action, and all Constitutional claims embedded in the new Sixth Cause of Action."

Petitioners opposed the motion, stating that "the additional causes of action were referred to and requested in the moving papers, the issue of amending the complaint to add additional causes of action was discussed at the oral argument on the original demurrer, and the additional causes of action arise out of the identical facts as pled in the original Petition." Petitioners noted that in their opposition to the City's demurrer, they stated that if the demurrer were sustained on Brown Act grounds, they could amend the petition to include "claims regarding violations of due process, equal protection, the right to petition the government, as well as claims related to government estoppel and other equitable theories." The court order allowed them to amend "on the grounds set forth in the moving papers," and because the constitutional grounds were set forth in the opposition, the additional causes of action were appropriate.

At the hearing on the motion on July 30, 2015, the court stated, "The motion to strike is granted. Causes of action two, three, and four" were stricken because "leave to amend is only applicable with regard to the cause of action to which a demurrer was placed. [¶] If one side wants to add causes of action, they

have to make a formal motion to add those causes of action." When petitioners' counsel pointed out to the court that the "moving papers" included a request to add those causes of action, the court said, "Moving papers were the demurrer papers," not the opposition. The court also noted that there was a demurrer pending "for the declaratory relief and the Brown Act causes of action," and that it was overruled.[4]

After the court and parties discussed setting a date for a hearing on the writ petition, petitioners' counsel said, "[T]here is other evidence that has come to light since the filing of the . . . initial petition, and I would request at this point leave to amend the petition." The court responded, "You have to file a motion." Petitioners' counsel said, "I'll file a formal motion." The court and counsel agreed to a date, November 12, for a trial setting conference and to hear petitioners' motion for leave to amend.

The court's minute order from the hearing stated, "The motion to strike is granted as to the second, third and fourth causes of action. When the court sustained the previous demurrer with leave to amend, petitioner was [*sic*] not entitled to add causes of action." The minute order did not say anything about striking other portions of the petition. The minute order also overruled the City's demurrer "as to the causes of action for declaratory relief and the Brown Act." In addition, the court stated, "The trial setting conference is continued to November 12, 2015. . . . Any motion for leave to amend the petition is to be filed and served so that it can be heard on November 12, 2015."

The record on appeal does not include a motion for leave to amend the petition. The City states in its brief that petitioners did not file a motion for leave to amend.

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[4] This demurrer is not included in the record on appeal.

C. Trial on the writ petition

The trial court's November 12, 2015 minute order is not included in the record on appeal. In another document filed by petitioners, they state that at the November 12 hearing, "Petitioners advised the court that they had withdrawn their fifth cause of action and that only the first (the Brown Act Claim) and sixth (Declaratory Relief) remained." In a footnote in their trial brief, petitioners stated that on November 12, the court ordered determination of the sixth cause of action to be "stayed until the First Cause of Action (the Brown Act claim) is decided."

The case was apparently set for two phases of trial: the first phase was set for trial in May 2016 before Judge Mary Strobel. Petitioners stated in their trial brief that the only question to be decided was whether the Brown Act applied, and if not, "this litigation will move to the next phase to determine whether the City is violating Petitioners' constitutional rights by excluding them from otherwise public meetings on the basis of their viewpoint with respect to matters of public concern." In its trial brief, the City stated that it "disputes that Petitioners' Constitutional claims embedded in the Sixth Cause of Action survived the intent of the Court's ruling granting the City's Motion to Strike."

Petitioners do not challenge the trial court's holding on the Brown Act claim on appeal, so the parties' positions and evidence are not detailed here. At the bench trial on May 24, 2016, Judge Strobel provided the parties with a nine-page tentative ruling. The court discussed the history of the HDRC beginning with its origins the 1990s. The court noted that the meetings were consistently "informal affairs in which developers would present their plans to the HDRC's group of design professionals for

feedback and criticism." Even after council members began inviting the public to attend the meetings, they "continued to be run as informal affairs, and not as Brown Act meetings." The court, focusing heavily on whether the City Council created the HDRC through formal actions, considered and rejected petitioners' argument that the HDRC was a "legislative body" subject to the Brown Act. The tentative ruling concluded, "Petitioners have not shown that the HDRC is a legislative body subject to the Brown Act. The petition for writ of mandate is denied."

The tentative ruling continued, "Petitioners request[ ] that if the court denies the petition, that the court send this matter to Department 1 for reassignment to an independent calendar court to hear Petitioner's sixth cause of action for declaratory relief. [Record citation.] The sixth cause of action appears to be based, at least in part, on the allegation that Respondent has violated the Brown Act, but also refers to the U.S. and California Constitutions. Since this court only decides whether the HDRC is subject to the Brown Act, and not whether its activities are otherwise proper under other laws, the court will refer the matter to Dept. 1 for reassignment."

At the trial, which was submitted on the papers with oral argument by counsel, counsel for the City asked to address the court's decision to reassign the case. The City argued that the constitutional claims in the declaratory relief cause of action were subsumed within the Brown Act claims, because "the only way that Petitioners can proceed on their constitutional claims is if there is a statutory right to be at these meetings." The City also asserted that "even though Judge O'Brien's order did not specifically state that the sixth cause of action was stricken, [the

City's] motion to strike clearly referred to the constitutional claims embedded in the declaratory relief cause of action." The court stated, "Okay, but that's not apparently what the order [on the motion to strike] said." Counsel for the City stated, "I agree."

Counsel for petitioners stated that issues relating to the First Amendment and equal protection remained outstanding, and "the essence of the claim is viewpoint discrimination." Petitioners also noted that Judge O'Brien did *not* strike any part of the declaratory relief cause of action, and had he done so, "we would have exercised our right to amend our complaint." Petitioners' counsel said that if there was any confusion, "rather than us [lose] constitutional claims based on a misunderstanding of Judge O'Brien's previous ruling, we would amend the petition if that's necessary."

During this discussion, Judge Strobel noted, "[A] statutory claim is different than a constitutional claim. All my Brown Act ruling is addressing is the statutory claim." At the conclusion of the hearing, the court stated that it would adopt the tentative as its final ruling. The court transferred the matter to Department 1 for reassignment to an individual calendaring court for resolution of the declaratory relief cause of action. The case was assigned to Department 36, Judge Gregory Alarcon presiding.

D. Motion for judgment on the pleadings

The City filed a motion for judgment on the pleadings on August 17, 2017. It asserted that the "cause of action for Declaratory Relief should be dismissed as it improperly asks the court to rule for a second time on what the writ court has already decided, the issue of whether the public has a right to attend HDRC meetings." The City also contended that to the extent the declaratory relief cause of action included constitutional claims,

those claims had been stricken in Judge O'Brien's order on the motion to strike, and therefore they were "not properly before the court." The City further challenged the substance of petitioner's constitutional claims, asserting that petitioners did not have "a fundamental right to attend what are essentially staff meetings."

Petitioners opposed the motion, asserting that Judge Strobel's ruling that the HDRC was not governed by the Brown Act was not equivalent to a ruling that respondents could exclude whomever they wanted from HDRC meetings. Petitioners asserted that the constitutional issues had not been stricken from the complaint based on the plain language of Judge O'Brien's ruling on the motion to strike, and that in transferring the matter for further proceedings after the writ petition was decided, Judge Strobel specifically stated that petitioners' constitutional claims were unresolved. Regarding the substance of their claims, petitioners asserted that O'Farrell's statements, which must be assumed true for purposes of the motion for judgment on the pleadings, showed that he unconstitutionally excluded petitioners from HDRC meetings based on their viewpoints. Petitioners also argued that they had viable constitutional claims regarding viewpoint discrimination, fundamental rights, due process, and equal protection. The City filed a reply in support of its motion.

At the hearing on the motion for judgment on the pleadings before Judge Alarcon on October 10, 2017, the City reasserted its argument that the HDRC meetings were not a public forum. The City asserted that petitioners did not have any constitutional rights in connection with a non-public forum. Petitioners' counsel argued that the Brown Act was not the only way to create a public forum. Petitioners' counsel also stated that the allegations

in the amended petition, taken as true for purposes of the motion, showed that there was a public forum and that certain people were excluded.

The court denied the motion in a written ruling the same day. It stated that petitioners "sufficiently allege a historically open forum from which plaintiffs have been excluded based upon the opinions expressed in their speech. ""The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place."' *San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist*. (2009) 46 Cal.4th 822, 839."

E. Nonsuit

For reasons that are not clear in the record, the case was transferred to Judge Elizabeth Allen White for the second phase of trial. Petitioners stated in their trial brief that they were seeking "a declaration [that the City] has violated the First and Fourteenth Amendments of the U.S. Constitution as well as the Liberty of Speech Clause of the California Constitution." The City's trial brief is not in the record on appeal.

On the first day of trial, December 5, 2017, counsel for the City stipulated that petitioners were not admitted to the HDRC meeting, and said, "The issue is whether or not this was a public meeting." The City argued that Judge Strobel had found that the meetings were not governed by the Brown Act, so "the only issue before this court properly is whether, in fact, the court can properly contradict the earlier court's ruling to find this was a public meeting whereas the writ court has already determined it [was] not."

The court asked for petitioners' opening statement. Petitioners argued that the City misrepresented the scope of the

case, because the previous decision held only that the meetings were not subject to the Brown Act; "It did not address the constitutional issue, which is the issue here." Petitioners' counsel asserted that even if the meeting were not a "true statutorily mandated public forum, the City is still not allowed to discriminate based upon individuals' stated point of view or their constitutionally protected right of access to the courts." He also stated that the evidence would establish that HDRC meetings had been open to the public for decades. Therefore, they were not private briefings for a city council member, as the City had asserted.

The City reiterated its position that the meetings were not public, and that Judge Strobel had already decided that issue. The City argued that petitioners' professed intent to exercise certain rights at the meeting was not relevant, because they "cannot turn it into a public meeting by saying what they wanted to do there." The City said it was a "private meeting" that "was in a private office held at the convenience and for the interest of city councilmembers."

Judge White, who had just been assigned the case, asked to see the amended petition. She noted that the amended petition alleged that the City violated the Brown Act *and* the state and federal constitutions, because "it's not in the disjunctive, it's in the conjuctive. I'm a little concerned that this was a Brown Act case and that based on the framework of the pleadings, I don't know whether we can go any further." The court discussed Judge Strobel's findings, and said, "I'm really bound by her rulings here."

Petitioners noted that Judge Strobel reassigned the case for further proceedings, therefore determining that the case was not

moot in light of her findings regarding the Brown Act. Petitioners also asserted that the City made the same argument in the motion for judgment on the pleadings, which Judge Alarcon rejected when he denied the motion.

Counsel for the City addressed some of these arguments and said, "I believe this suit, as it is presently addressed, is subject to a nonsuit." The court asked if the City was making a motion for nonsuit, and the City's counsel said yes. The court asked petitioners to respond, and petitioners' counsel said this was "exactly what was argued and was ruled on by Judge Alarcon." Discussing case law, petitioners' counsel argued that the HDRC meetings were traditionally public, and petitioners were excluded based on their viewpoint.

The court reviewed Judge Strobel's ruling on the writ petition, and noted that witnesses had stated in declarations that HDRC meetings were not public, the agendas were not made available to the public, and there were no rules as to when members of the public could speak. The court stated, "So it appears that the argument that this . . . through long tradition became a quasi-public forum or a public forum appears to be belied by the declarations and the findings of Judge Strobel."

The court asked petitioners to make an offer of proof as to their witnesses' testimony. Petitioners' counsel said petitioner Doug Haines, who had attended HDRC meetings for many years, would testify that these were not private meetings, they were "more like public presentations, where developers [would] come and present their project and get feedback from architects and the planning committee and the public," and "there was a moment for public comment whereby the public was allowed and encouraged to make public comment on various projects." Haines

would also testify that in his experience, the "public hearing component of project review in the City of Los Angeles is generally a done deal," and that in order to have meaningful community input, it was important to "get involved early" in forums such as the HDRC. Petitioner George Abrahams would testify similarly. Witness Aaron Epstein would testify that O'Farrell told him that he did not want to open HDRC meetings "to people who just want to disagree with me." Witness Craig Cox would testify that O'Farrell told him that he did not want to open HDRC meetings to "people who just want to cause trouble, disagree with projects and file lawsuits."

The court took a short recess and then returned with its ruling. It noted that the three constitutional causes of action had been stricken because they were outside the scope of leave to amend. With respect to whether the meetings were public, the court stated, "The fact that for over periods of time . . . various city council[members] decided that it was advantageous to have community members participate doesn't mean that they have now turned that into a public forum or a quasi-public forum. The character of the property doesn't change." Because the meeting was at the private office of an architect, the court found that the forum was private. The court therefore concluded that nonsuit was warranted.

Petitioners asked for leave to amend the complaint, and the court questioned whether it would make any difference, since there was no public forum. Petitioner's counsel argued that the public forum was not determined by the physical location, but by the nature of the meeting. The court responded that even if the public had been invited to the meetings in the past, "[t]hat does not turn a private venue into a public venue."

The court entered judgment in favor of the City. Petitioners timely appealed.

DISCUSSION

A. Nonsuit

A defendant may move for nonsuit after a plaintiff has completed his or her opening statement. (Code Civ. Proc., § 581c, subd. (a).) Nonsuit is appropriate when the trial court determines, as a matter of law, that the evidence presented is insufficient to permit a finding in favor of the plaintiff. (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 663-664.) A claim that a governmental entity violated the state or federal constitution is a proper subject of a declaratory relief claim. (See, e.g., *Lane v. City of Redondo Beach* (1975) 49 Cal.App.3d 251, 255; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1723 ("An action for declaratory relief lies when the parties . . . dispute whether a public entity has engaged in conduct or established policies in violation of applicable law."].)

"We review rulings on motions for nonsuit de novo, applying the same standard that governs the trial court." (*Hernandezcueva v. E.F. Brady Co., Inc*. (2015) 243 Cal.App.4th 249, 257.) "In deciding whether a nonsuit on the opening statement is proper, the trial court and reviewing court must assume the plaintiff can prove all the favorable facts presented in the opening statement." (*Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1421.) "'Nonsuit may be granted only if there is no substantial evidence upon which reasonable minds could differ.'" (*Joyce v. Ford Motor Co*. (2011) 198 Cal.App.4th 1478, 1488.)

Before we turn to the substance of the parties' arguments, we must determine the scope of the issues presented. The City

asserts on appeal that the "motion to strike eliminated all constitutional claims lurking in plaintiffs' cause of action for declaratory relief." We disagree. The City moved to strike petitioners' second, third, fourth, and fifth causes of action, and "references to Constitutional claims in paragraphs 91-102 of Petitioners' First Amended Verified Petition." In partially granting the motion, the trial court stated that the "motion to strike is granted as to the second, third and fourth causes of action." The court did not strike additional portions of the petition, and the court overruled the City's demurrer as to the Brown Act and declaratory relief causes of action. Nothing in the record before us suggests that the court intended to strike any portion of the petition other than what is explicitly referenced in the order. Thus, we do not find that the court struck portions of the declaratory relief cause of action.

We therefore consider whether nonsuit was appropriate on petitioners' declaratory relief cause of action, as alleged in the amended petition, in which petitioners contended that the City and City Council "deliberately failed and refused, and continue to deliberately fail and refuse, to allow members of the general public to attend public meetings of the HDRC." Petitioners asserted that this was intended to "discourage public participation at required hearings and to minimize opposition to projects favorable to the City Council members and to discriminate and retaliate against Petitioners for their exercise of their fundamental rights to free speech, assembly, association, and to petition the government for redress of grievances." We find that petitioners' allegations and proposed evidence were sufficient to overcome the City's motion for nonsuit.

1. *First Amendment claims*

Petitioners assert that nonsuit was inappropriate because the HDRC meetings constituted a designated public forum or a nonpublic forum. They argue that as a governmental entity, the city cannot exercise viewpoint discrimination in a public or nonpublic forum, their evidence would have shown that they were excluded from HDRC meetings based on viewpoint, and therefore the City violated rights protected by the First Amendment to the United States Constitution. The City contends that the meetings were not forums at all, but instead "government advisory sessions," which petitioners had no right to attend.[5]

The law is clear that a governmental entity may not bar citizen speech in either public or nonpublic forums based on the viewpoint of the speaker. "[T]he participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." (*City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission* (1976) 429 U.S. 167, 175-176.)

On the other hand, citizen participation is not required in every aspect of governing, and not every advisory meeting is a forum for public discussion. "Citizens are not entitled to exercise their First Amendment rights whenever and wherever they wish." (*Kindt v. Santa Monica Rent Control Bd.* (9th Cir. 1995)

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[5] The parties agree that the controlling issue in this case is the nature of the meeting, not the location of it. No party asserts that the trial court was correct in holding that because the meeting was held in a private office, it was not a public forum.

67 F.3d 266, 269.) "Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted." (*Minnesota State Bd. for Community Colleges v. Knight* (1984) 465 U.S. 271, 284 (*Knight*).)

Thus, the question before us turns on whether the HDRC meeting was a "forum" in which the public was permitted to contribute and viewpoint discrimination is prohibited, or a private meeting of advisors, at which neither the public nor petitioners had constitutional rights. "[I]n a progression of cases, [the Supreme] Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech." (*Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez* (2010) 561 U.S. 661, 679.)

Petitioners rely on seminal case *Perry Education Association v. Perry Local Educators' Association* (1983) 460 U.S. 37 (*Perry*). In that case, a "collective-bargaining agreement with the Board of Education provided that Perry Education Association [(PEA)], but no other union, would have access to the interschool mail system and teacher mailboxes" in the schools of Perry Township, Indiana. (*Id*. at p. 39.) A rival union, the Perry Local Educators' Association (PLEA), challenged the lack of access to the teachers' mailboxes, alleging that that "PEA's preferential access to the internal mail system violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment." (*Id*. at p. 41.)

The Supreme Court noted that "[t]he existence of a right of access to public property and the standard by which limitations

upon such a right must be evaluated differ depending on the character of the property at issue." (*Perry, supra*, 460 U.S. at p. 44.) The Court discussed three types of forums. First, "quintessential public forums," such as public streets and parks, are "places by which by long tradition or by government fiat have been devoted to assembly and debate." (*Id*. at p. 45.) In these forums, "the rights of the state to limit expressive activity are sharply circumscribed." (*Ibid*.) Second, there is "public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." (*Ibid*.) For example, "[a] public forum may be created for a limited purpose such as use by certain groups [citation], or for the discussion of certain subjects." (*Id*. at p. 46, fn. 7.) In these "designated public forums," "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." (*Id*. at p. 46.) The third category is "[p]ublic property which is not by tradition or designation a forum for public communication." (*Ibid*.) In these "nonpublic forums,"[6] "the state

[6] As our Supreme Court has observed, "Although it may be convenient shorthand, the phrase 'nonpublic forum' is somewhat misleading. Property in this category is not 'nonpublic' in the sense that it is privately owned; it remains at all times public property either owned or controlled by the government. Nor is the property a 'forum' in the sense of a meeting place or medium for open discussion; on the contrary, it is precisely because it is not such a meeting place or medium that the government can lawfully close it to such discussion. In short, a 'nonpublic forum' is simply public property that is not a public forum by tradition

may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Ibid.*)

The Court held that the teacher mailboxes constituted a nonpublic forum under the third category. (*Perry, supra*, 460 U.S. at p. 46.) The Court found that there was no First Amendment violation because the restriction on the use of the mailboxes was based on PEA's status as the teachers' union, not the content of the communication. (*Id.* at p. 48.) The Court said there was no evidence supporting the position that the school district was discriminating based on the unions' viewpoints: "There is . . . no indication that the school board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views." (*Id.* at p. 49.) The Court stated, "Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of *all* Perry Township teachers.[ ] Conversely, PLEA does not have any official responsibility in connection with the school district and need not be entitled to the same rights of access to school mailboxes." (*Id.* at p. 51.)

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or design." (*Clark v. Burleigh* (1992) 4 Cal.4th 474, 483, fn. 9.) Regarding any of the three categories of forums, ultimately "the label is immaterial, because the relevant question is whether we apply heightened scrutiny." (*American Freedom Defense Initiative v. King County* (9th Cir. 2015) 796 F.3d 1165, 1169, fn. 1.) Here the distinction is largely immaterial, since petitioners have asserted that the restriction was not content-neutral, and therefore was unconstitutional under any level of scrutiny.

The Supreme Court also rejected PLEA's equal protection challenge. Because PLEA's First Amendment rights had not been violated, no fundamental right was at issue, and therefore the "policy need only rationally further a legitimate state purpose. That purpose is clearly found in the special responsibilities of an exclusive bargaining representative." (*Perry, supra*, 460 U.S. at p. 54.)

Petitioners note that in this case, unlike *Perry*, there was evidence of viewpoint discrimination in O'Farrell's statement that he did not want to admit people who would disagree with him to the HDRC meetings. Petitioners contend that the dissent in *Perry*, written by Justice Brennan and joined by three additional justices, more closely fits the facts of this case. The dissent stated that First Amendment cases provide "no support . . . for the notion that government, once it has opened up government property for discussion of specific subjects, may discriminate among viewpoints on those topics." (*Perry, supra,* 460 U.S. at pp. 60-61 (dis. opn. of Brennan, J.).) The dissent stated PLEA was "asserting a right to be free from discrimination. The critical inquiry, therefore, is whether the board's grant of exclusive access to [PEA] amounts to prohibited viewpoint discrimination." (*Id*. at pp. 62-63.) The dissent continued, "The board has agreed to amplify the speech of [PEA], while repressing the speech of [PLEA] based on [PLEA's] point of view. This sort of discrimination amounts to censorship and infringes the First Amendment rights of [PLEA]." (*Id*. at pp. 65-66.)

The City asserts that *Perry* is not applicable. It argues that the HDRC meetings are not forums at all, and instead are more comparable to the meetings in *Knight, supra,* 465 U.S. 271. In

that case, a state law divided public employees into bargaining units, and established a procedure to designate an exclusive bargaining agent for each unit. The public employers were required to "meet and negotiate" and "meet and confer" with the exclusive representatives concerning the terms and conditions of employment. (*Id*. at p. 274.) Following enactment of the statute, the "Minnesota Community College Faculty Association (MCCFA) was designated the exclusive representative of the faculty of the State's community colleges." (*Id*. at pp. 275-276.) "[Twenty] Minnesota community college faculty instructors who are not members of MCCFA" filed a lawsuit "challenging the constitutionality of MCCFA's exclusive representation of community college faculty in both the 'meet and negotiate' and 'meet and confer' processes." (*Id.* at p. 278.)

The Supreme Court stated that the faculty members "do not and could not claim that they have been unconstitutionally denied access to a public forum. A 'meet and confer' session is obviously not a public forum." (*Knight, supra*, 465 U.S. at p. 280.) Citing *Perry*, the Court stated, "for government property to be a public forum, it must by long tradition or by government designation be open to the public at large for assembly and speech. Minnesota college administration meetings convened to obtain faculty advice on policy questions have neither by long tradition nor by government designation been open for general public participation." (*Ibid*.)

The Court stated that the faculty members "make a claim quite different from those made in the nonpublic forum cases. They do not contend that certain government property has been closed to them for use in communicating with private individuals or public officials not acting as such who might be willing to

listen to them. Rather, they claim an entitlement to a government audience for their views." (*Knight, supra*, 465 U.S. at p. 282.) The Court continued, "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." (*Id*. at p. 283.) Instead, "Legislatures throughout the nation, including Congress, frequently enact bills on which no hearings have been held or on which testimony has been received from only a select group. Executive agencies likewise make policy decisions of widespread application without permitting unrestricted public testimony. Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear. To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices." (*Id*. at p. 284.)[7]

The City asserts that HDRC meetings are similar to the meet-and-confer sessions in *Knight*, because they "are a curated,

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[7] Justice Brennan also dissented in *Knight*, stating that "two related First Amendment interests" were at stake: non-MCCFA faculty members' inability to "express their views on important matters of academic governance to college administrators," and the "right to be free from compelled associations with positions or views that they do not espouse." Justice Brennan stated that the statute "impermissibly forces non-union faculty members to choose between these two rights." (*Knight, supra*, 465 U.S. at pp. 295-296 (dis. opn. of Brennan, J.).) Justice Stevens also dissented, stating that the statute "gives only one speaker a realistic opportunity to present its views to state officials," and "the First Amendment does not permit any state legislature to grant a single favored speaker an effective monopoly on the opportunity to petition the government." (*Id*. at pp. 300-301 (dis. opn. of Stevens, J.).)

selected gathering of experts to provide insight for a single councilmember. They are not a forum under *Perry* at all." The City continues, "Councilmember O'Farrell is permitted to hold a meeting with his 'select group' of experts and advisors to gather information, and he is free to exclude members of the public from those meetings." The City also points out that the public has "other modes of expressing views on the projects presented" for approval, such as planning commission meetings or in public meetings before the City Council.

We find that the evidence petitioners sought to introduce at trial was sufficient to allow a factfinder to determine that the meetings were a forum. In deciding whether a grant of nonsuit was proper, we "assume the plaintiff can prove all the favorable facts presented in the opening statement." (*Galanek v. Wismar, supra*, 68 Cal.App.4th at p. 1421.) We therefore must assume that petitioners can prove their allegation that HDRC meetings were "by long tradition or by government designation . . . open to the public at large for assembly and speech." (*Knight, supra*, 465 U.S. at p. 280.) We "look[ ] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." (*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* (1985) 473 U.S. 788, 802 (*Cornelius*).)

Petitioners stated that Doug Haines planned to testify that for decades, HDRC meetings had been held in various locations and had been open to the public. He would also testify that at the meetings, developers would first present projects and get feedback, after which the meetings were opened to public comment. Petitioners stated that Haines would also testify that this early public input carried more weight than subsequent

input at later hearings on design projects. Assuming these allegations would be supported by the evidence, the HDRC meetings constituted a forum, and the City could not constitutionally exclude petitioners based on their viewpoint.

The City asserts that even if the HDRC meetings had been open to the public in the past, "the City was free to close the HDRC forum" without running afoul of any citizens' constitutional rights. It cites *DiLoreto v. Downey Unified School District Board of Education* (9th Cir. 1999) 196 F.3d 958 (*DiLoreto*), in which a school booster club raised funds by selling advertising to be displayed on the baseball field fence. The school board declined to place an ad with the text of the Ten Commandments and an additional religious message, and the person who wanted to purchase the advertisement challenged the school's decision. (*Id*. at pp. 962-963.) The school later discontinued the fundraising program and took down all advertising. (*Id*. at p. 963.) The Ninth Circuit held that "[c]losing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access while avoiding the appearance of government endorsement of religion." (*Id*. at p. 970.)

The circumstances in this case are dissimilar to those in *DiLoreto*. Here, the HDRC was not eliminated; instead, petitioners assert that it was closed only to the people with whom O'Farrell disagreed. Once a public entity "has created a forum generally open for use by" the public, it "has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the

public, even if it was not required to create the forum in the first place." (*Widmar v. Vincent* (1981) 454 U.S. 263, 267-268.)

Moreover, halting a school fundraiser to avoid the appearance of religious endorsement, as in *DiLoreto*, is not comparable to closing a government meeting regarding local development to avoid input from people who have a certain viewpoint. "'Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city. It is doubtless partly for this reason that such meetings, once opened, have been regarded as public forums, albeit limited ones.'" (*Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 174, quoting *White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421, 1425.) Thus, we are not persuaded that the reasoning in *DiLoreto* applies here.

The City also argues that O'Farrell's alleged "post-hoc remarks" change nothing because "[m]otive is not relevant." To the contrary, "[c]ontrol over access to a nonpublic forum" must be "reasonable in light of the purpose served by the forum and . . . viewpoint neutral." (*Cornelius, supra*, 473 U.S. at p. 806.) As O'Farrell's statements referenced the content of petitioners' speech—stating that he would exclude people who disagreed with him—the limitation was not viewpoint neutral. Instead, the alleged exclusion was based entirely on the speaker's viewpoint. In addition, petitioners have asserted that O'Farrell excluded them in retaliation for filing lawsuits against the City. The right to petition the government for redress of grievances is "one of 'the most precious of the liberties safeguarded by the Bill of Rights'" (*BE & K Const. Co. v. N.L.R.B.* (2002) 536 U.S. 516, 524), and "the First Amendment bars retaliation for protected speech." (*Crawford-El v. Britton* (1998) 523 U.S. 574, 592.) Petitioners

have therefore asserted valid claims for declaratory relief under the First Amendment.

2. *Equal protection*

In their amended petition, petitioners also contended that the City deprived them of their right to equal protection under the Fourteenth Amendment of the United States Constitution. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439.)

As an initial matter, the City asserts that petitioners forfeited the opportunity to proceed on equal protection grounds because "on the day of trial and in opposition to the motion [for] nonsuit, [petitioners] never stated a desire to seek relief based on the Equal Protection Clause." The City cites no authority for the proposition that counsel's arguments define the scope of a party's viable claims for relief. In the case the City cites, *Brown v. Boren* (1999) 74 Cal.App.4th 1303, the plaintiff stipulated to the scope of the issues before trial, a trial was held on those issues, and then the plaintiff asserted a different legal theory on appeal. Here, petitioners have not changed their legal theories on appeal, and the reasoning of *Brown* is not applicable.

Moreover, petitioners characterized the issue to the trial court as follows: "You can't discriminate against people based on their point of view any more than you can discriminate against people based on their race." Although petitioners' counsel did not cite the Equal Protection Clause specifically, it was sufficiently clear that petitioners were asserting the constitutional claims

they had alleged in the declaratory relief cause of action, which included claims to equal protection.

"Government action that suppresses protected speech in a discriminatory manner may violate both the First Amendment and the Equal Protection Clause. . . . Where plaintiffs allege violations of the Equal Protection Clause relating to expressive conduct, we employ 'essentially the same' analysis as we would in a case alleging only content or viewpoint discrimination under the First Amendment." (*Dariano v. Morgan Hill Unified School Dist*. (9th Cir. 2014) 767 F.3d 764, 779.) As with the First Amendment theory, petitioners' allegations and offer of proof were sufficient to support their claim that O'Farrell's alleged exclusion of petitioners from the HDRC meeting was impermissibly based on their viewpoint or in retaliation for filing past lawsuits. Thus, the nonsuit motion should have been denied on petitioners' equal protection theory as well.

B. Leave to amend

Petitioners assert, "To the extent Judge White's denial of Petitioners' final request to amend their Petition amounted to a sufficient cause to support a grant of nonsuit, the court erred." The City asserts there was no "denial" of leave to amend, because petitioners did not make a formal request to amend. The City also argues that had Judge White denied such a request, it would not have been an abuse of discretion.

As discussed above, we find no support in the record for the City's contention that Judge O'Brien struck petitioners' constitutional claims from the declaratory relief cause of action in his order on the motion to strike. In addition, we find that petitioners' contentions and proposed evidence were sufficient to overcome the City's motion for nonsuit. As petitioners challenge

any denial of leave to amend only "to the extent" it led to the grant of nonsuit, petitioners' assertion is moot in light of our holdings regarding the merits of petitioners' claims.

DISPOSITION

The judgment is reversed. Petitioners are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.